IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0276
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
TIMOTHY LEE RAY,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200501733

Honorable David M. Roer, Judge

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Terry Goddard, Arizona Attorney General
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Attorneys for Appellee

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Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial on charges alleged in two indictments, which had been consolidated, appellant Timothy Lee Ray was convicted of second-degree burglary, a class three felony, and theft, a class one misdemeanor. The trial court sentenced Ray to an

aggravated prison term of five years and a jail term, respectively.[1] On appeal, Ray challenges the trial court's denial of his motion to suppress statements he made to a police officer and contends the aggravated prison term is erroneous and illegal. We affirm the convictions but vacate the sentence and remand the case for resentencing for the reasons stated below.

Miranda Issue

¶2 We review for clear and manifest error a trial court's ruling on a motion to suppress evidence, *State v. Weinstein*, 190 Ariz. 306, 308, 947 P.2d 880, 882 (App. 1997), upholding the ruling unless the court abused its discretion, *State v. Bentlage*, 192 Ariz. 117, ¶ 2, 961 P.2d 1065, 1066 (App. 1998). We consider only the evidence presented at the suppression hearing, viewing it and all reasonable inferences from it in the light most favorable to upholding the trial court's ruling. *State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007). In his written motion, Ray requested a voluntariness hearing. He maintained that the statements he had made to police officers after he was arrested violated his constitutional rights because the officers interrogated him without giving him the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

¶3 On the first day of trial, but before the trial began, the trial court conducted the hearing on the motion to suppress. Officer Gerrod Rosson of the Eloy Police Department testified that he had received a call about a house having been burglarized,

[1]At the sentencing hearing, the court credited Ray with presentence incarceration time and found the jail term had been served.

saying he believed the suspect had been described as a black male. He found a "black male subject" "just behind the residence, [in] the yard on the opposite side of the dirt alleyway." Rosson testified further that the person, later identified as Ray, "was crouched down in a position to where the buttocks would be resting almost on the heels and looking down towards the ground." Around Ray, Rosson saw sections of copper pipe and foam insulation. He asked Ray what he was doing, and Ray responded: "What does it look like I'm doing?" Rosson stated that he then asked Ray where he had gotten the materials, and Ray responded he had found them on the ground, denying he had gone into the yard. Rosson testified, "I went ahead and detained the subject. He was placed under investigative detention."

¶4 Rosson placed Ray in handcuffs and put him in the back seat of a patrol car after he "*Terry*-frisked [Ray]," an apparent reference to a pat-down search for weapons under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). Rosson found footprints in the yard and copper pipes inside and outside the house and noted in places it looked as though some pipes had been removed. Rosson returned to the patrol car and asked Ray to remove his shoes in order to compare them to the prints, but Ray refused. According to Rosson, Ray then paused and said: "I did it, man, I went into the yard and took the copper." Ray gave Rosson his shoes, and Rossen gave Ray *Miranda* warnings. At that point, Ray told Rosson he would talk to him, and Rosson asked why he had taken the copper pipes. Ray told Rossen he sells the copper in Casa Grande and admitted he did not have permission to go into the house.

¶5 On cross-examination, defense counsel elicited from Rosson that Ray had maintained he thought the house was abandoned and he could go inside it and take the copper. Rosson admitted he had not given Ray *Miranda* warnings until after he had asked Ray to take off his shoes.

¶6 Defense counsel argued below that Ray's admission that he had taken the copper pipes was inadmissible because it had been made while Ray was in custody before Rosson had given him *Miranda* warnings. The state conceded Ray was in custody at that point but maintained that Ray had not been interrogated, relying on *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638 (1990); *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682 (1980); and *State v. Landrum*, 112 Ariz. 555, 544 P.2d 664 (1976). Denying the motion, the trial court found there had been no violation of Ray's rights because "the request to inspect shoes was not calculated to elicit a response that would incriminate. . . . Miranda need not be given for those administrative requests." It is unclear whether the court found Ray had been in custody when he made the statement. The court further found there was no evidence of threat or violence, concluding the statements had been voluntarily made.

¶7 Because of the state's concession below, we assume Ray was in custody when he admitted having taken the copper pipes. But, regardless of whether the trial court considered Ray was in custody at the time he made the statement, the court did not err when it denied the motion to suppress. Interrogation "refers not only to express questioning, but

also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301, 100 S. Ct. at 1689-90; *see also State v. Smith*, 193 Ariz. 452, ¶¶ 19-20, 974 P.2d 431, 437 (1999) (officer's response, "What meth?" to defendant's comment that he had recently used methamphetamine was not interrogation; officer's statements "were not made . . . with the expectation that they would lead to incriminating statements by the defendant").

¶8 Ray argues on appeal that, because he was in handcuffs, he could not have taken his shoes off, suggesting a verbal response by him was necessary. Even assuming this to be true, that verbal response could have been a request by Ray for assistance in taking off his shoes. Ray was not asked about the offense; there was neither a question pending nor a remark that could have been construed as calling for a verbal response. Ray made the statement that he had gone into the yard spontaneously and voluntarily rather than in response to a question posed by Rosson or even a statement by him that reasonably could be construed as designed to elicit a verbal response. The trial court's findings in this regard are not erroneous, nor did the trial court abuse its discretion in denying the motion to suppress.

Aggravated Prison Term

¶9 Ray also challenges the propriety of his aggravated prison term. As we understand his arguments, they are as follows. Ray first appears to contend the trial court

erred by giving too much weight to the aggravating circumstances and not enough weight to the mitigating circumstances. Relying on the Supreme Court's decisions in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), Ray also seems to be arguing the state failed to prove beyond a reasonable doubt the existence of two prior felony convictions the court relied on as aggravating circumstances. And he seems to be suggesting that because there was insufficient evidence establishing the existence of the prior convictions, he was entitled to have a jury, not a judge, find the remaining factors the court relied on in imposing the aggravated term. In a separate, though somewhat related argument, Ray argues the remaining factors are tantamount to elements of the offense, and therefore, the court's reliance on them was unlawful in any event. And, he contends, based on only the two prior felony convictions, faulty though they purportedly are, it is unclear whether the court would have imposed the aggravated term.

¶10 Ray's challenges to the existence of the prior convictions as an aggravating circumstance under *Blakely* and *Apprendi* are meritless. The fact of prior convictions is expressly excepted from the purview of those cases. *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536; *Apprendi*, 530 U.S. at 490, 120 S. Ct. at 2362-63. But, we are unable to review Ray's remaining claims to determine the propriety of the aggravated prison term because the trial court did not articulate on the record all of the aggravating circumstances it relied on in imposing the aggravated term. Under our supreme court's decision in *State v. Harrison*,

195 Ariz. 1, 985 P.2d 486 (1999), this was structural error, which is not subject to a harmless error review.

¶11 In *Harrison*, the supreme court concluded the requirement in A.R.S. § 13-702(B) that a sentencing judge set forth on the record any aggravating circumstances relied on helps insure the accuracy and propriety of those factors; "'tends to assure that judges will give thought to whether or not each sentence, even a stipulated one, is appropriate'"; explains to the defendant and the community the reasons for the particular sentence; "'helps ensure that the process does not become purely mechanical'"; and allows more meaningful appellate review. 195 Ariz. 1, ¶¶ 10-11, 985 P.2d at 488-89, *quoting State v. Holstun*, 139 Ariz. 196, 197, 677 P.2d 1304, 1305 (App. 1983). Accordingly, it held that a trial court must state any aggravating circumstances it finds on the record and must substantially comply with § 13-702(B). 195 Ariz. 1, ¶¶ 11-12, 985 P.2d at 489. The court stated: "Substantial compliance means that the factors supporting an aggravated or mitigated sentence must be in the sentencing transcript. To go beyond that would be to conduct a harmless error analysis." *Id*. ¶ 13.

¶12 Here, the trial court first found the state had established Ray previously had been convicted of two felonies based primarily on the records from those cases, which the trial court stated it had reviewed. The court then addressed Ray in a general way, commenting on the convictions, but not articulating aggravating circumstances, much as the trial court in *Harrison* had done. After imposing the aggravated, five-year term on the

burglary conviction and the jail term for theft, the court stated: "The court finds mitigating factors and aggravating factors [exist,] which are stated in the report [and] are adopted by the Court. In addition, the Court does find the prior conviction factors present as well in the two cause numbers, thus justifying and calling for an aggravated sentence." The presentence report listed as mitigating circumstances the nonviolent nature of the offenses and Ray's poor health. As aggravating circumstances, the report listed the following:

- The offense involves the taking of or damage to property.
- The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
- The defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense.
- The defendant has been convicted of similar offenses in the past.
- The defendant has a lengthy prior record.
- The defendant's failure to benefit from past lenient treatment by the Court.

¶13 Other than the prior felony convictions, the court did not clearly articulate the aggravating circumstances on the record. Incorporating the aggravating factors in the presentence report does not assure that the trial court adequately thought about the appropriate sentence, prevent the sentencing process from becoming mechanical, or explain to the defendant or the public the reasons for the particular sentence. Moreover, we find it

to be, at least potentially, an unlawful delegation of sentencing discretion and authority by the judge to the probation department. *See State v. Brooks*, 156 Ariz. 529, 531, 753 P.2d 1185, 1187 (App. 1988) (although probation officer may recommend defendant be placed on intensive probation supervision, trial court may reject recommendation or sentence defendant to term of imprisonment). Consequently, we do not find reference to a presentence report without further specificity to be substantial compliance with § 13-702(B) as contemplated by our supreme court in *Harrison*. Moreover, even assuming there was sufficient evidence before the trial court to establish the existence of the prior convictions, we cannot address the remaining claims because of the lack of clarity.

¶14 The convictions are affirmed, but the prison sentence is vacated, and this matter is remanded for resentencing.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

PETER J. ECKERSTROM, Judge